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## HUMAN RIGHTS APPROACH TO WATER IN THE ETHIOPIAN CONTEXT: LEGAL AND POLICY ASSESSMENTS AND CHALLENGES

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### ABSTRACT

*The supply of accessible, adequate, clean and drinkable water in order to improve the quality of life has remained a challenge for many countries. One possible way of ensuring accessibility to clean water is to articulate it from a human rights perspective. International human right instruments have recently been invoked to infer human right to water and are increasingly getting scholarly attention. In Ethiopia, laws and policies have been enacted in the last two decades to enhance a legally protected access to clean water. This article discusses rights of citizens and obligations of the state related to the right to clean water as enshrined in the constitution and other relevant laws. The article explores the manner in which the right to clean water is spelled out boldly in the FDRE Constitution. It further explores how the human right to water is elaborated in the Water Resource Management Proclamation and Water Resource Management Policy of the country and other laws and policies. However, there are some legal impediments that have become barriers to the enjoyment of the right. Absence of proper judicial interpretation of the right to water made the exact nature and scope of the right unknown in the Ethiopian context. This article argues that the human right to water is justiciable and it is within the power of the courts to interpret the human right to water vis-à-vis international and regional human rights instruments. It, thus, proposes that Ethiopian courts should adopt an expansive approach to interpreting the right in crystallizing the exact nature and scope of the right and improve the quality of life via citizens' enjoyment of the right to water.*

**Keywords:** Ethiopia, human rights, human right to water, socio-economic rights, water

### I. INTRODUCTION

Water is one of the most “essential, shared, and scarce natural resources” so basic to the very existence of humanity.<sup>1</sup> It is a finite resource without an alternative and upon which there is a total dependence for survival. Social and economic development is closely tied to water and

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<sup>1</sup> P.P. Mollinga, *Water, Politics and Development: Framing a Political Sociology of Water Resources Management*, 1(1) WATER ALTERNATIVES, 7-23 (2008).

poverty is prevalent mostly in areas that face water shortage.<sup>2</sup> It must be noted that there are many poor countries with abundant water resources but vulnerable to lack of clean and drinkable water services due to lack of sustainable development and infrastructure.

It is paramount to define two important concepts before the article delves into the discussion about the human right to water. The right to water can be discussed from at least two aspects of water rights, i.e. basic water right and water use right. The two phrases are used differently in this article. The basic water right is also known as the human right to water (interchangeably used with water right) is a term that is in vogue these days throughout the world and is a concept that is mostly associated with Third World Countries.<sup>3</sup> Basic water right refers to the right of use of water for domestic use such as for drinking, cooking and related household level of water consumption. The human right to water is “a personal right, a right of all persons”.<sup>4</sup> The human right to water is all about providing clean, safe and sufficient water required on daily basis and is recognized in many international human right instruments. Water use right, on the other hand, refers to a particular entitlement or a right based upon a predefined prioritization rules. It should be noted that “human right to water” refers to the basic water right and the water use right is not within the scope of this article.

Despite the recent attention paid to water, many people still lack access to clean, safe and sufficient water needed for everyday life. The advantages of utilizing the human rights approach are that “water needs are transformed into water rights”.<sup>5</sup> The vertical relationship of human rights law, i.e. between the state and the individual, means that the right to water is applicable to everyone within that state.<sup>6</sup> As Scanlon *et al* noted “by making water a human right, it could not be taken away from the people”.<sup>7</sup>

The Millennium Development Goals (MDG) under goal 7 set to half the number of people denied of access to water and sanitation by 2015.<sup>8</sup> The UN Sustainable Development Goal (SDG) under Goal 6 stipulates that ensuring access to water and sanitation for all by the end of 2030 is “an essential part of the world we want to live in.”<sup>9</sup> Despite such global commitment to improve the situation, data continue to prove the desperate situation of water problem across the globe. One billion people lack access to improved water resources; 2.6 billion people are without

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<sup>2</sup> Salman M.A Salman, *The human Right to Water and Sanitation: is the Obligation Deliverable?* 39:7, WATER INTERNATIONAL 969-982 (2014).

<sup>3</sup> Pedi Obani and Joyeeta Gupta, *The Evolution of the Right to Water and Sanitation; Differentiating the Implications*, Vol. 24(1), REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW, 27-39, 28 (2015).

<sup>4</sup> *Id.* 272.

<sup>5</sup> Amanda Cahii, *The Human Right to Water-a Right of Unique Status; The legal Status and the Normative Content of the Right to Water*, 9:3, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, 390 (2005).

<sup>6</sup> *Id.*

<sup>7</sup> John Scanlon, Angela Cassar and Noemi Nemes, *Water as a Human Right?* Paper for the 7<sup>th</sup> International Conference on Environment Law, ‘Water and the Web of Life’, Sao Paulo, Brazil, 2-5 June 2003 in *Id.*, at 390.

<sup>8</sup> Millennium Development Goals agreed by the 191 UN member states at a plenary session of the 2000 Millennium summit and Ethiopia is one of the counties that have achieved Goal 7 of MDG in terms of providing access to safe drinking supply. Available at <http://www.un.org/millenniumgoals/> (accessed on 28<sup>th</sup> of September 2017)

<sup>9</sup> UN, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Resolution A/RES/70/1, 25 September 2015 (Sustainable Development Goal/SDG).

provision for sanitation and 1.5 million children under five die annually of water-borne diseases.<sup>10</sup> Almost 663 million people, one in every ten-persons, lack access to safe water globally and 2.4 billion people are without access to improved sanitation facilities according to World Health Organization and United Nations International Children's Emergency Fund Joint Monitoring Programme.<sup>11</sup> Moreover, in 2015, nearly half of all people using unimproved drinking water sources live in sub-Saharan Africa.<sup>12</sup>

In 2001, the average access to clean and safe water supply was about 17% of the total population of Ethiopia.<sup>13</sup> This may be cited as an example of a very low supply and coverage level even by Sub-Saharan African standards.<sup>14</sup> In 2012, close to 42 million people in Ethiopia did not have access to safe water and over 71 million did not have adequate sanitation.<sup>15</sup> More than 9,000 children die every year from preventable diarrhoea diseases caused by poor water and sanitation.<sup>16</sup> In 2015, close to 43% of the total population did not have access to clean and safe drinking water.<sup>17</sup> This shows that the water coverage is very low coupled with the unreliability and non-sustainability of the supply of safe water.<sup>18</sup>

Lack of access to clean water is also directly related to the maintenance of public health. Water-related diseases, caused by the unsafe drinking and the absence of proper sanitation facilities, are among the leading causes of death in the developing world.<sup>19</sup> For instance, improved access to clean water can reduce diarrhea and waterborne diseases by at least 25% and improved sanitation is accompanied by more than a 30% reduction in child mortality.<sup>20</sup> Similarly, environmental hygiene, under the right to health, would require the protection of water resources from contamination.<sup>21</sup> Provision of the right to food is closely associated with the availability of clean water. Moreover, under the right to food, it would be necessary to provide equitable access to water and water management systems, including sustainable rain harvest and irrigation technology.<sup>22</sup>

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<sup>10</sup> Salman M.A Salman, *supra* note 2, 969.

<sup>11</sup> Progress on Drinking Water and Sanitation, Update and MDG Assessment. UNICEF and World Health Organization, New York, USA, 2 (2015), available at <http://apps.who.int/iris/bitstream> (Accessed on 28 of February, 2017).

<sup>12</sup> *Id.*, at 15.

<sup>13</sup> Ethiopian Water Sector Policy, The Federal Democratic Republic of Ethiopia, Ministry of Water Resources (hereinafter Ethiopia Water Sector Policy), II (2001). Available at <https://www.cmpethiopia.org/page/479> (accessed on 28<sup>th</sup> of September 2017).

<sup>14</sup> *Id.*

<sup>15</sup> Water Aid Ethiopia, 1, available at <http://www.wateraid.org/where-we-work/page/ethiopia>, (accessed on 28<sup>th</sup> of February, 2017).

<sup>16</sup> *Id.*

<sup>17</sup> See Global Health Observatory of May 2016 <http://apps.who.int/gho/data/node.cco> (accessed on 3rd of October 2017).

<sup>18</sup> Ethiopian Water Sector Policy, *supra* note 13, III.

<sup>19</sup> Salman, *supra* note 2, at 969.

<sup>20</sup> Corinne J. Schuster-Wallace, Velma I. Grover, Zafar Adeel, Ulisses Confalonieri, and Susan Elliott, Safe Water as the Key to Global Health, The United Nations University, at 6, (2008), available at <http://www.inweh.unu.edu> (Accessed on 28<sup>th</sup> of February, 2017).

<sup>21</sup> Obani and Gupta, *supra* note 3, 33.

<sup>22</sup> *Id.*

The very objective of this article is to infer the human right to water from FDRE Constitution and other subsidiary laws to enhance current conceptualizations and ultimately improve citizens' enjoyment of the right to water. The article will also serve as an eye opener for Ethiopian courts to interpret the right to water in line with many of the international human right instruments Ethiopia has adopted. To do this, the article relied mainly on the FDRE Constitution, Ethiopia Water Resource Proclamations and Water Resource Policy, environmental and related policies and regulations as well as international human right instruments and relevant commentaries by UN Committee on the Economic, Social and Cultural Rights (CESCR). Moreover, secondary sources of scholarly articles, books and online sources have been referred to and consulted in the course of writing this article.

After this introductory section, Section II proceeds with tracing back the roots of historical genesis of the human right to water. It deals with the different international and regional human right instruments, soft laws and general comments of the UN CESCR that make reference to the human right to water. Section III discusses the manner in which a human right to water may be inferred from the constitutional text and interrogate the extent to which Water Resource Management Proclamation and Water Resource Management Policy of Ethiopia and related laws and policies give content to the right to water. Section IV interrogates whether it is possible to judicially enforce the human right to water and the related challenges. Finally, under section V, conclusions are drawn on the potential of interpreting the human right to water in line with international human right instruments as a means to enhance the enjoyment of the human right to water in Ethiopia.

## **II. HUMAN RIGHT TO WATER: CONCEPT, SCOPE AND DEVELOPMENTS**

This section examines the developments relating to the human right to water that has appeared in different international and regional human rights conventions, soft laws including important UN resolutions and General Comments of the UN Committee on the Economic, Social and Cultural Rights (CESCR).

### **A. International Human Rights Conventions**

The debate on the human right to water started as early as the end of the Second World War. After the Second World War, human rights emerged from the United Nations system as a prominent international law approach for the protection of human dignity.<sup>23</sup> The UN's Economic and Social Council drafted the Universal Declaration of Human Rights.<sup>24</sup> This gave rise to the legally binding International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The human right to water laid its foundation in the centrality and necessity of water to other ICESCR and ICCPR rights although the explicit recognition of water as an individual human

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<sup>23</sup> *Id.* at 27.

<sup>24</sup> *Id.* at 28.

right has yet to take place.<sup>25</sup> It has been recognized as an integral part of other human rights, such as the right to life, which is contained on ICCPR, and the rights to health, food, housing and adequate standards of living, which are included in the ICESCR. Article 11 of the ICESCR forms the basis of the right to water in international law and is partially reproduced as follows:

The State Parties to the present Covenant [ICCPR] recognize the right to an adequate standard of living for himself and his family, *including adequate food, clothing, and housing, and to the continuous improvements of living conditions* (emphasis added).<sup>26</sup>

In addition, Article 1(2) of ICCPR and ICESCR provides “in no case may people be deprived of its own means of subsistence”, which must, for survival, include water.<sup>27</sup> The aforementioned international agreements do not expressly refer to the right to water; rather they are about the right to an adequate quality of life and the right to good health.<sup>28</sup>

Moreover, two relatively recent conventions namely the Convention on the Elimination of Discrimination against Woman (CEDAW)<sup>29</sup> and the Convention on the Rights of the Child (CRC) has explicitly recognized water as an individual human right. CEDAW under article 14 (2) (h) stipulates that state parties shall take all appropriate measures “to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and *water supply*” (emphasis added). The CRC under article 24 (1) (2(c)) stipulates that:

State parties recognize the right of the child to the enjoyment of the “highest attainable standards of health”... and pursue full implementation of this right and, in particular, shall take appropriate measures: (c) to combat diseases and malnutrition,...through the provision of adequate nutritious foods and *clean drinking water*, taking into consideration the dangers and risks of environmental pollutions (...).<sup>30</sup>

The CRC’s provision relates only to a certain aspects of water, “that of quality (safety) and it does not include availability and accessibility of water”.<sup>31</sup>

It is also important to briefly discuss the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter Watercourse Convention) in light of the human right to water context.<sup>32</sup> Article 10 of the Watercourse Convention refers about the relationships between different kinds of water uses. Article 10, paragraph 1, states that “no use of

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<sup>25</sup> The centrality of the water offers significant reinforcement to the concept of a human right to water, because without water many of the rights contained in the core international human rights instruments would be meaningless and left devoid of any practical effect. See Salman, *supra* note 2, 973.

<sup>26</sup> See also article 12 of the ICESCR. Article 12.1 stipulates that ‘The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest standards of physical and mental health’. Article 12 indicates the steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for (b) the improvements of all aspects of environmental and industrial hygiene.

<sup>27</sup> Cahii, *supra* note 5, 391.

<sup>28</sup> Antonio Embid Irujo, *The Right to Water*, 23(2) INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT, 267-283 269 (2007).

<sup>29</sup> Ethiopia has signed the agreement on Jul 8, 1980 and deposited Sep 10, 1981 via ratification. Available at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (accessed on 20th of February, 2017).

<sup>30</sup> Ethiopia has ratified the agreement on 14 May 1991, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src> (accessed on 28<sup>th</sup> of March of 2016).

<sup>31</sup> Cahii, *supra* note 5, 391.

<sup>32</sup> The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, UNGA Resolution A/RES/51/229, 36 ILM 700.

an international watercourse enjoys inherent priority over other uses.” In the following paragraph, 10.2, it is stated that in the event of a conflict, it shall be resolved “with special regard being given to the requirements of vital human needs”. There is a problem of the definition of “vital human needs”. In clarifying the expression, the UN General Assembly stated that ‘in determining “vital human needs”, special attention is to be paid to providing sufficient water to sustain human rights, including both drinking water and water required for the production of food in order to prevent starvation’.<sup>33</sup> Thus, drinking water is the most vital human need. It almost certainly implies that water for cooking and washing to maintain public health standards also falls within the scope of vital human needs.

Other treaties that refer to the right to water include the Geneva Convention Relative to the Treatment of Prisoner of War, and the Geneva Convention Relative to the Treatment of Civilian in time of War as well as Additional Protocol I thereto, and Additional Protocol II. Under the 1949 Geneva Convention relative to the Treatment of Civilian Persons in Times of War stipulates that detaining powers have an obligation in providing adequate water for internee’s basic water needs such as sanitation and personal laundry.<sup>34</sup> Under the same Convention in connection with food, internees must also be provided with sufficient drinkable water.<sup>35</sup> The same Convention also imposes an obligation on the detaining powers to provide internees with drinkable water to maintain them in good health during transfers from one place into another.<sup>36</sup> In the Protocol additional to the Geneva Convention of August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), basic water infrastructures that are vital to the survival of civilians are afforded protection and must not be “attached, destroyed, removed or rendered useless”.<sup>37</sup> According to the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), to persons whose right of movement has been limited due to the armed conflicts, drinking water shall be provided to the same extent as the local civilian populations, and basic water infrastructures must also be protected from demolition and attacks.<sup>38</sup> Moreover, Convention on the Rights of Persons with Disabilities (CRPD) of 2006 mentions the human right to water in the context of the social protection of disabled persons.<sup>39</sup>

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<sup>33</sup> Salman, *supra* note 2, 971.

<sup>34</sup> See Art 85, Geneva Convention relative to the Treatment of Civilian Persons in Times of War, 12 August 1949, 75 UNTS 287, entered into force 21<sup>st</sup> October 1950.

<sup>35</sup> *Id.* Arts 26 and 29.

<sup>36</sup> *Id.* Art 46.

<sup>37</sup> See Art 54, Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977, 1125 UNTS 3, entered into force 7 December 1949).

<sup>38</sup> See, Arts 5 and 14, Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II), 8 June 1977, 1125, UNTS 609, entered into force on 7 December 1978.

<sup>39</sup> See art 28 of CRPD. The CRPD was adopted during the 61st Session of the General Assembly: see GA Res. 61/611, 13 December 2006, A/61/611; 15 IHRR 255.

## B. African Human Rights Frameworks and Other Agreements

This subsection discusses the textual basis of the right to water in mainstream regional human rights treaties in Africa. In addition to the absence of a comprehensive and separate guarantee of the human right to water in the international human rights treaties, the basic regional human rights agreement, the African Charter on Human and Peoples' Rights (Africa Charter), has failed to incorporate the right to water.<sup>40</sup>

Another leading regional human right instrument, the African Charter on the Rights and Welfare of the Child (African Child Charter), provides that member countries shall fully implement the right and ensure "*the provision of adequate nutrition and safe drinking water (emphasis added)*".<sup>41</sup> The scope of the provisions of the African Child Charter applies only to children and limits the content of the right to the mere regulation of ensuring access to safe drinking water and excludes physical accessibility and affordability.<sup>42</sup>

Similarly, the Protocol to the African Charter on Human and People's Rights of Woman in Africa<sup>43</sup> provides that state parties shall take "appropriate measures to provide women with *access to clean drinking water (emphasis added)*".<sup>44</sup> The aforementioned instruments say nothing on the amount of safe water that should be available to the ultimate beneficiaries of the right.<sup>45</sup>

There are regional non-human right treaties that provide a direct point of legal reference for the normative definition of the promotion and realization of the human right to water. Inferring human right to water is not limited to the implicit terms of the African Charter, but also to the more explicit and demanding substantive provisions of the African Convention on the Conservation of Nature and Natural Resources (hereinafter ACCNNR). The ACCNNR contains peculiar substantive provisions that are important in promoting and realizing the human right to water. Under the same Convention, member countries undertook "to adopt the measures to ensure conservation, utilization, and development of soil, water....in accordance with scientific principles and with due regard to the best interest of the people".<sup>46</sup> However, the most relevant core substantive provision is found in Article V(1). It relates to the provision of states obligation to promote water quantity and continuous delivery. The provision is reproduced as follows:<sup>47</sup>

The Contracting States shall establish policies for conservation, utilization, and development of underground and surface water, and shall endeavor to guarantee for their populations *a sufficient and continuous supply of suitable water (emphasis added)*.

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<sup>40</sup> Takele Soboka, *The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights system*, Vol. 11 (2) AFRICAN HUMAN RIGHTS LAW JOURNAL, 344, 341-367 (2011).

<sup>41</sup> See article 14 of the African Charter on the Rights and Welfare of the Child, adopted 11 July 1990 and entered into force 29 November 1999, available at <http://www.refworld.org/docid/3ae6b38c18.htm> (accessed on 01-Mar-2017)

<sup>42</sup> Takele Soboka, *supra* note 40, 344.

<sup>43</sup> African Charter on Human and People's Rights of Woman in Africa, adopted 13 September 2000, entered into force 25 November 2005, available at [www.achpr.org/instruments/women-protocol/](http://www.achpr.org/instruments/women-protocol/) (Accessed on 01 March, 2017)

<sup>44</sup> Art 15(a) African Charter on Human and People's Rights of Woman.

<sup>45</sup> Takele Soboka, *supra* note 40, 345.

<sup>46</sup> *Id.*, at Art III.

<sup>47</sup> *Id.*, at Art V(1).



The ACCNNR imposes an obligation on member states to put in place policies that promote the conservation, utilization and development of water sources. The Convention also imposes an obligation on states to exert effort to provide ample and sustainable water supply suitable for human use. The Convention has incorporated an important part of the human right to water core contents such as water availability, quantity and water service continuity.<sup>48</sup> Thus, it is safe to conclude that the human right to water approach is partially addressed in the ACCNNR.

### C. Soft Laws

In addition to international and regional human rights conventions, various international conferences since the 1970s have also made a declaration on the right to water. For example, the right to water was affirmed in the Action Plan on “Community Water Supply” issued by the Mar del Plata Conference in Argentina in 1977,<sup>49</sup> and in Agenda 21 on the 1992 UN Conference on Environment and Development.<sup>50</sup> The International Conference on Water and the Environment in Dublin in 1992 also recognized the right to water.<sup>51</sup> The 1992 Declaration of Dublin is not the same as instrument produced by a convention. However, it is important to make reference in the context of the human rights to water. The Declaration of Dublin has four famous principles in which the fourth principle is relevant to the discussion at hand. The principle begins by saying in economic terms that “water has an economic value in all its competing uses and should be recognized as an economic good” and goes on to add that “Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price”. The declaration of a fundamental right that includes both supply and sanitation while making specific reference to “an affordable price” sets the framework for the content of the right within the broad-based statement of a declaration of this nature.

The UN General Assembly’s legally non-binding resolution declared a human right to water and sanitation.<sup>52</sup> The Resolution has declared “the right to safe and clean drinking water and

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<sup>48</sup> The core contents of the human right to water will be discussed in detail in the subsequent section.

<sup>49</sup> Report of the United Nations Water Conference (Mar del Plata, 14-25 March 1977) (UN Doc.E/CONF.70/29, 1977) (‘Mar del Plata Declaration’). Indeed this is the first instrument to be issued by an international meeting that included an explicit reference to the right to water.

<sup>50</sup> Agenda 21, in: Report of the UN Conference on Environment and Development (UN Doc. A/Conf. 151/26, 14 June 1992), Chapter 18. Agenda 21 of the Rio Summit ‘Program of Action for Sustainable Development’ included a separate chapter (Chapter 18) on freshwater resource. Chapter 18 states that ‘In developing and using water resources, priority has to be given to the satisfaction of basic and the safeguarding of the ecosystem’.

<sup>51</sup> Dublin Statement on Water and Sustainable Development (Dublin, 31 January 1992), available at <http://www.un-documents.net>. (Accessed on 27<sup>th</sup> September , 2017) Principle 4 of the Dublin Statement on Water and Sustainable Development proclaimed that ‘water has an economic value in all its competing uses and should be recognized as an economic good’. Yet, this principle clarified further that ‘it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price’. See also Salman, *supra* note 2, 970.

<sup>52</sup> General Assembly Resolution, UNO document A/RES/64/292. The document was adopted with 122 states voting in favor none against and 41 including Ethiopia abstained. Some countries like the United States noted that that the right to water and sanitation does not exist in a legal sense as described by the Resolution. The same stand was followed by the United Kingdom, Canada, Sweden, Japan, Ireland, Australia and Austria. The representative of Ethiopia said ‘he had abstained although access to clean water was a natural right. States had the sovereign right to their own natural resources, according to the United Nations Charter, and that principle should have been included in the text’. See available at <https://www.un.org/press/en/2010/ga10967.doc.htm> (accessed on 1 October 2017)



sanitation as a human right that is essential for the full enjoyment of life and all human rights”.<sup>53</sup> Moreover, the UN Human Rights Council in its resolution in the same year has elevated the status of access to drinkable water as one of the fundamental human rights.<sup>54</sup> The Resolution marked a turning point in the long debate on the human right to water.<sup>55</sup> The UN Human Rights Council adopted the “Human Right on Access to Safe Drinking Water and Sanitation” by affirming “that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity”.<sup>56</sup>

The 2004 Berlin Rules on the Uses of the Water of International Rivers also discuss the human right to water.<sup>57</sup> Chapter IV deals with the right of persons. Article 17 of this chapter states that ‘every person has a right of access to sufficient, safe, acceptable, physically accessible and affordable water to meet that individual’s vital human needs.’ Everyone has the right to obtain water within acceptable physical accessibility and the economic affordability. The quality of the water must also be safe for consumption in a sufficient amount.

#### **D. General Comment No. 15 of UN Committee on the Economic, Social and Cultural Rights**

In addition to formally codified international human right instruments, there are international human rights legal standards and guidelines, which refer to the right to water. Among others is General Comment No 15 adopted by the Committee on Economic Social and Cultural Rights (CESCR). General Comment No. 15 (hereinafter GC 15) is the most comprehensive recommendation of the CESCR to governments, elaborating the right to water in the ICESCR. Although it is not a binding instrument nor a rule or guideline passed through the General Assembly Resolution, its contribution to the issue at hand necessitated the discussion here. General Comment No. 15 ensures that “the right to water was the least protected right”.<sup>58</sup>

The reason that the CESCR was forced to work on this General Comment is to give clarification regarding the normative nature and content of the right to water and to define states’ obligations towards the same right.<sup>59</sup> Since there is no direct explicit acknowledgement of the right to water in the ICESCR, the CESCR has dealt with detail length issues pertaining to general and specific core obligations of states, measure of incorporation of the right to water in national laws and policies as well as the corresponding penalties and remedies available for victims of

<sup>53</sup> General Assembly Resolution, UNO document A/RES/64/292.

<sup>54</sup> Human Rights Council Resolution, UNO document A/HRC/15/L.14) available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G10/163/09/PDF/G1016309.pdf?OpenElement> (accessed on 1 November 2016).

<sup>55</sup> A. Belinskija and L. J. Kotzé, Obligations arising from the right to water in Finland and South Africa, *AQUATIC PROCEDIA* 6 (2016) 30 – 38, (World Water Week, WWW (2015).

<sup>56</sup> Human Rights Council Resolution, *supra* note 54, para 3.

<sup>57</sup> See Berlin Rules of 2004 on the Uses of the Water of International Rivers developed by International Law Association, a private non-governmental institution. Available at [https://www.internationalwaterlaw.org/documents/intldocs/ILA\\_Berlin\\_Rules-2004.pdf](https://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf) (Accessed on 27<sup>th</sup> of September 2017).

<sup>58</sup> Erik K. Bluemen, *The Implication of Formulating a Human Right to Water*, 31:4 *ECOLOGY LAW QUARTERLY* 957 (2004): 957-1006.

<sup>59</sup> Cahii, *supra* note 5, 392.

violations of the right to water.<sup>60</sup> Moreover, CESCRC also called upon states parties to have a comprehensive policy dealing specifically with the human right to water as a separate right or secondary to other related rights.<sup>61</sup> Therefore, these aforementioned reasons compelled CESCRC to draw GC 15 as guidance and recommendations to states parties on their effort to promote and ensure the right of access to water in compliance with the international human right standards.<sup>62</sup>

CESCRC has relied on derivation and inference as an analytical foundation for the recognition of the right to water and sanitation.<sup>63</sup> It relied upon the derivation of a right to water from Article 11 and 12 of the ICESCRC.<sup>64</sup> The core content of the relevant provision is reproduced as follows<sup>65</sup>:

Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living ‘including adequate food, clothing and housing’. The use of the word ‘including’ indicates that this catalog of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival...*The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1)(emphasis added).*<sup>66</sup> The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.<sup>67</sup>

The normative content of the right to water as set out in GC 15 initially defines the entitlements recognized by the right to water. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.<sup>68</sup> Sufficient and safe water is “necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements”.<sup>69</sup> In addition, GC 15 paragraph 6 states that priority in the allocation of water must be given to the right to water for personal and domestic uses. This means that the GC 15 has given the human right to water the highest priority among potential water use rights. In other words, it clearly states that priority of water use should go to water for survival and basic needs.<sup>70</sup>

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<sup>60</sup> Irujo, *supra* note 28, 269.

<sup>61</sup> *Id.*

<sup>62</sup> See GC 15, at para. 3.

<sup>63</sup> Salman, *supra* note 2, 972.

<sup>64</sup> GC 15, at para 3.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> With regard to quality, the water required for each personal or domestic use must be safe, therefore free from microorganism, chemical substances and radiological hazards that constitute a threat to a person’s health. See GC 15, para. 12 (b).

<sup>69</sup> *Id.*, at para. 2.

<sup>70</sup> Cahii, *supra* note 5, 400.

### E. State's Domestic Obligations

The normative content leads to the question about the State Parties' core obligations with regard to the right to water. The right to water, like any other human rights, imposes three types of obligations on states: obligation to respect, obligation to protect, and obligation to fulfill.<sup>71</sup>

The obligation to respect requires that state parties refrain from directly or indirectly intruding with the enjoyment of the right to water.<sup>72</sup> The states have the power to frustrate people's access to water and sanitation. States tend to disconnect water in some cases arbitrarily. When consumers are unable to pay water tariffs, disconnection measures must be carried out if there is an alternative, sufficient and safe water source.<sup>73</sup> The restriction on disconnections has important consequences for the realization of the human right to water. States may successfully serve half of the population with clean water, but if there is no protection against disconnection, progress may be significantly negated.

The obligation to protect requires states to prevent third parties from interfering in any way with the enjoyment of the right to water.<sup>74</sup> While the ICESCR does not place legal obligation directly on private actors, it requires that states take action, e.g. private companies should not pollute the water that is used for domestic consumption. The duty to protect also implies that states protect drinkable watercourses from contamination by non-state third parties.

The third obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide water.<sup>75</sup> The right to water includes the right to maintain existing water supplies necessary for the enjoyment of the right. The ICESCR demands that states must use all available means to implement progressively the right to water. This means actively mobilizing available resources, nationally and locally. The right to water cannot be realized overnight as the nature of the right demands huge resource and investment. The duty to fulfil imposes an obligation on the states to take immediate steps in the direction of ensuring the right of access to water. The duty to fulfil includes developing a plan and strategy on expanding affordable access as well as protecting the quality of the water supply.<sup>76</sup> It means implementing the plan and monitoring its implementation over time.<sup>77</sup>

Despite GC 15 effort to define the core contents of the human right to water in an authoritative form, it hardly escaped critics. The GC 15 lack of clarity remains on the normative content of the right and the core obligation of states to human right to water.<sup>78</sup> Another major

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<sup>71</sup> GC 15, at para 20-29.

<sup>72</sup> *Id.* at para 22-22.

<sup>73</sup> The CESCR Committee set out a number of procedural safeguards that must be satisfied before disconnection can proceed. See *Id.* at para 56.

<sup>74</sup> *Id.* at para 23-24.

<sup>75</sup> *Id.* at para 25-29.

<sup>76</sup> *Id.* at para 28.

<sup>77</sup> *Id.*

<sup>78</sup> For a detailed discussion on the discontents of GC 15, see Takele Soboka Bulto, the *Emergence of Human Right to Water in International Human Right Law: Invention or Discovery*, Vol. 12, (1), MELBOURNE JOURNAL OF INTERNATIONAL LAW, 1-25 11 (2011).

weakness of the GC 15 within the contents of the standard is the inadequacy of highlighting the sanitation provision as an integral part of the right to water.<sup>79</sup>

### III. HUMAN RIGHT TO WATER UNDER ETHIOPIAN LAW

Guided and influenced by international law and dialogues, countries have increasingly recognized the right to water in their domestic laws and constitutions.<sup>80</sup> This section covers the Ethiopian Constitution, the Ethiopian Water Resource Management Proclamation, Public Health Proclamation and Policy, the Ethiopian Water Resource Management Policy, Ethiopian Environmental Policy, National Hygiene and Sanitation Strategy, Ethiopian Growth and Transformation Plan I and II, and the Ethiopian Human Rights Action Plans.

#### A. Inferring a Constitutional Right to Water from the 1995 FDRE Constitution

The conceptualization of the right to water in international human rights instruments constructs a universal entitlement to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.<sup>81</sup> The right to water is not explicitly mentioned under Chapter three of the Constitution. However, the constitution, under the social object, makes explicit reference to a human right to water subject to the condition of availability of the resource. Article 90 (1) provided that “to the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, *clean water*, housing, food and social security” (*emphasis added*).

The main objective of Article 90(1) of the FDRE Constitution is the promotion of social objective. In the context of the human right to water, Article 90(1) deals with the provision of access to water supply service instead of the provision of the water supply. Moreover, the provision of clean water supply is subject to the country's available resources. Abdi and Kwadwo noted that “social objectives do not contain all duties that social rights (the right to water) impose on the state as they are formulated in general terms”.<sup>82</sup> One thing very clear from the wording of Article 90(1) of the Constitution is that the right is framed as “collective right” rather than “individual right”. The provision makes it clear that the beneficiaries of the right are “all Ethiopians” and it does not enable individual to have standing on the right to clean water. This will raise an issue of interpretation and has its own implication on the enforceability of the right.

In furtherance of the provision of the right to clean water, the FDRE Constitution adds that “(a)ny organ of Government shall, in the implementation of the Constitution, other laws and

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<sup>79</sup> Cahii, *supra* note 5, 390.

<sup>80</sup> Some countries such as South Africa under article 27 (1) of the 1996 have in their Constitution provisions on the human right to water. Uruguay in 2004, article 47 of its Constitution explicitly recognizes that ‘access to drinking water and sanitation is a basic human right’. More recently, Bolivia’s Constitution states in article 16 that: ‘Every person has the right to water and food’. In Morocco, article 31 of the Constitution (1 July 2011) stipulates that: ‘The State, public institutions and local authorities are working in mobilize all means available to facilitate equal access of the citizens to the conditions allowing them to enjoy the rights of access to water and a healthy environment’.

<sup>81</sup> GC 15, at para 2.

<sup>82</sup> Abdi Jibril Ali and Kwadwo Appiagyei-Atua, *Justiciability of Directive Principles of State Policy in Africa: The Experiences of Ethiopia and Ghana*, Vol. 1, ETHIOPIAN JOURNAL OF HUMAN RIGHT, 18 (2013).

public policies, be guided by the principles and objectives specified under this Chapter (National Policy Principles and Objectives)".<sup>83</sup> The wording of the FDRE Constitution imposes an obligation on all organs of the government including the judiciary to be guided by the specific objectives, among other things, the social objectives of article 90(1).

Moreover, the Constitutional impetus for reading the right to water into the Bill of Rights is provided by the state's obligation to comply and confirm with international human rights law principles and standards. Article 13(2) of the FDRE Constitution reads: "[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia". There are several rights in Chapter three into which aspects of the human right to water may be read. For instance, it is stated that "[a]ll persons have the right to a clean and healthy environment".<sup>84</sup> Considering that the CESCR's GC 15 regards the sustainability and quality of water resources as integral components of the right to water, it is possible to argue that a human right to water may be read into interpretations of environmental rights in the 1995 Constitution.<sup>85</sup> Water is part of the environment and must be kept free from contamination and pollution. The sustainability and quality of water for basic human consumption can be maintained if water is protected from pollution. Thus, access to clean water is one of the core contents of the right, i.e. safety.<sup>86</sup>

The FDRE Constitution states that "(e)very Ethiopian national has the right to equal access to publicly funded social services".<sup>87</sup> The provision of equal access to public funded social services such as the supply of water is related to the human right to water since one of the core contents of the right is the accessibility of the service on equal basis without discrimination. To this end, UN's CESCR GC 15 stipulates that core contents of the human right to water are the "entitlements including the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water".<sup>88</sup> And, the significance of access to water service as an important component of the human right to water is emphasized by the same Constitution, which stipulates that "the state has the obligation to allocate ever increasing resources to provide to the public health, education and other social services".<sup>89</sup>

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<sup>83</sup> Art 85 of Chapter 10 of the FDRE CONSTITUTION.

<sup>84</sup> *Id.* at Art 44.

<sup>85</sup> GC 15, at para 11 -12. It must be noted that the General Comment of ESCR are not binding. However, its services a source of inspiration where courts can infer in order to clarify contents of the human right to water. For instance, in Argentina, Supreme Court invoked General Comment 15 in the 'Kersich Juan Gabriel Yotros e/Aguas Bonaerenses yotros s/amparo (herein after Kersich)' and concluded that access to drinking water is a fundamental right and community interest and is therefore subject to the exercise of collective right. Available at [www.adaciudad.org.ar/.../CSJN-Kersich-c.-Aguas-Bonaerenses-s.-a](http://www.adaciudad.org.ar/.../CSJN-Kersich-c.-Aguas-Bonaerenses-s.-a). (accessed on 3rd of October 2017)

<sup>86</sup> In the Kersich case, the High Court of Argentina pronounced the explicit recognition of the right to water as a collective right deriving from its integration in the right to the environment. See *Id.*

<sup>87</sup> Art. 41 (3) of the FDRE CONSTITUTION.

<sup>88</sup> GC 15, at para, 10.

<sup>89</sup> *Id.* at Art. 41 (4).

## B. Elaborating the Right to Water in the Ethiopian Water Resource Management Proclamation

One of the most important governing laws with regard to basic water rights in Ethiopia is the FDRE Water Resources Management Proclamation No.197/2000 (hereinafter called the Water Resource Proclamation). This proclamation has a much larger scope in contrast to its preceding repealed Water Resources Utilization Proclamation. The Proclamation regulates three aspects of water namely the management, environmental protection and utilization aspects of water resources in Ethiopia.<sup>90</sup> Whereas the previous revoked Water Resources Utilization Proclamation only dealt with narrow aspects of the water use regulations, the current proclamation further regulates the management aspect of water resources.<sup>91</sup> And, very relevant to the on-going discussion on the human right to water is the regulation of water use priorities and is rightly and boldly articulated in the Water Resources Proclamation. It aims to achieve that water use allocation rights must be geared towards protecting and utilizing the water resources of the country in order to maximize social benefits of the people of Ethiopia.<sup>92</sup>

It is visible that the human right to water is an important value and social objective of the Water Resources Proclamation and it wants to attain the goals by deploying the use of the water resources of the country to the highest social benefits.<sup>93</sup> There is a need for the definition of “social benefits” in order to contextualize it in the realm of the human right to water. The “social benefits” can be related indirectly to the human right to water and “social benefits” in the context of the human right to water must be defined. The definition can be deduced from prominent international human right documents, the FDRE Constitution and other national water laws and policies. For instance, under the Food and Agriculture of the United Nations Legislative Study, Stephen Hodgson states that “the right to water is a putative human right which is claimed to exist either as a right in itself or as an ancillary aspect of the ‘right to food’ created by Article 11 of the ICESCR”.<sup>94</sup> The FDRE Constitution embodies social objectives, among other things, access to clean water as one of the social objectives of the constitution.<sup>95</sup> The Constitution wording of access to clean water is in line with the terminology used by international and regional human right instruments as well as with GC 15 of UN CESCR. In a similar vein, the FDRE water policy document (to be discussed in next sections) also confirms that highest water use right is allocated to water supply and sanitation.<sup>96</sup> Thus, the aforementioned national and

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<sup>90</sup> See preamble of the Ethiopia Water Resources Management Proclamation 197/2000, FEDERAL NEGARIT GAZETA, 61<sup>st</sup> Year No. 25 ADDIS ABABA, 9<sup>th</sup> March 2000.

<sup>91</sup> *Id.*, Art. 32(1) stating, “The Water Resources Utilization Proclamation No. 92/1994 is hereby repealed.” See also, Zbelo Hailelassie Embaye, *The Quest for Standard Tests in Prioritizing Water Use Rights in Ethiopia: Reasonable Use, Beneficial Use or ‘Beyond’*, 10 (1), MIZAN LAW REVIEW, 198 (2016).

<sup>92</sup> See, paragraph 1 of the preamble and the third line sentence of Art 3 FDRE Water Resources Management Proclamation 197/2000. See also Zbelo, *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Joseph L. Sax, ‘Reserved Public Rights in Water’, VERMONT LAW REVIEW, 36:535 (2012), at 8. See also *Id.*, at 204.

<sup>95</sup> See FDRE CONSTITUTION, Art 90(1).

<sup>96</sup> See FDRE, Ministry of Water resources, Ethiopian Water Resources Management Policy, 5 (1995).

international documents validate that ‘the status of automatic allocation (as a priority for “social purposes” under the Ethiopian water law) is related with the priority given to domestic uses’.<sup>97</sup>

The Water Resources Proclamation, in relation to different types of water uses, gives a primarily preference among the potential water uses<sup>98</sup> to “domestic water use” that has a core value of promoting the very idea of the human right to water. Domestic use<sup>99</sup> is considered utilization of water at a household level that is basic to sustain human life.<sup>100</sup> In the same manner, the Ethiopian Water Resource Management Policy gives an absolute preference and protection priority among the potential water uses to domestic water uses.<sup>101</sup> The domestic water use is protected without any limitations and other potential water use must comply with the absolute protection of water uses at the household level.<sup>102</sup> The human right to water core idea is further reinforced is “exception of the non-requirement of permit for domestic water uses”.<sup>103</sup> All the aforementioned laws and policies reinforce each other and the justification is largely related to the human quest for survival<sup>104</sup> since “the right to life is beyond any right”.<sup>105</sup>

The Water Resource Proclamation has used the terminology ‘domestic use’ and non-exhaustive listing. Gleick argue ‘a human right to water should only apply to basic needs for drinking, cooking and fundamental domestic uses.’<sup>106</sup> On the other hand, Younis contends that the right to water means water for drinking and sanitation or water for other uses.<sup>107</sup> Langford questioned whether the right to water should be extended beyond household uses to include water for food production.<sup>108</sup> He gave an example of Ethiopia, where water is essential for keeping livestock and farming crops.<sup>109</sup> Lack of water has led to famine, as 80% of water use is

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<sup>97</sup> See also, Zbelo Hailelassie, *supra* note 91, 211.

<sup>98</sup> Under Ethiopian Water Law, water use is defined as the “... use of water for drinking, irrigation, industry, power generation, transport, animal husbandry, fishing, mining and uses of water for other purposes”. See art 29) of Council of Ministers Ethiopian Water Resources Management Regulations No. 115/2005, FEDERAL NEGARIT GAZETA, 11<sup>th</sup> Year No. 27 Addis Ababa, 29<sup>th</sup> March, 2005.

<sup>99</sup> *Domestic use* comprises the utilization of water resources for drinking, cooking, washing etc. See FDRE Water Resources' Management Proclamation, 197/2000. Art 2(6). It also resembles to the UN Committee work on ESCR in which it defines domestic and personal use as constituting ‘drinking, personal sanitation, washing of cloths, food preparation, personal and household hygiene’.

<sup>100</sup> Anthony Scott and Georgina Coustalin, *The Evolution of Water Rights*, NATURAL RESOURCES JOURNAL, Vol 36 (1995), 873.

<sup>101</sup> FDRE, Ministry of Water resources, Ethiopian Water Resources Management Policy, (1999), at 12, under the “General policies of water”, Roll number 10, of section 2.1.1. Comment I borrowed from one of the reviewers: ‘Unlike other countries’ water law, the Ethiopian Water Resource Proclamation does not provide ‘order of priorities’, except domestic use as the first priority’.

<sup>102</sup> Read both Art 7(1) and 7(2) of FDRE Water Resources Management Proclamation 197/2000.

<sup>103</sup> See Art 7(1) about domestic use FDRE Water Resources Management Proclamation 197/2000. See also, Zbelo Hailelassie, *supra* note 91, 204.

<sup>104</sup> See Scott and Coustalin, *supra* note 100, 867.

<sup>105</sup> Irujo, *supra* note 28, 267-28 citing Art 12 paragraph 1 of International Declaration of Human Rights (1948). See also, Zbelo Hailelassie, *supra* note 91, 202.

<sup>106</sup> Peter H. Gleick, *The human right to water*, WATER POLICY 1 (1998) 487-503.

<sup>107</sup> *Id.*

<sup>108</sup> M Langford Coordinator of the Right to Water Programme, COHRE, Day of General Discussion, UN CESCR 29<sup>th</sup> Session, Geneva, (2002) in Cahii, *supra* note 5, 401.

<sup>109</sup> *Id.*



for agriculture. As such, there are competing uses for scarce water.<sup>110</sup> However, the position of GC 15 is not clear on the distinction between domestic use and other uses which are necessary for survival.

Another important point worth discussing in relation to the human right to water is the ownership of water. Under the FDRE Constitution and the Water Resource Proclamation, all Ethiopian waters are publicly owned. According to Article 40(3), without mentioning water as such by name, the right of ownership of all natural resources is exclusively vested in the state and the peoples of Ethiopia. The FDRE Constitution is clear, as who owns the water resources and it states that water resources are the common property of the nations, nationalities, and peoples of Ethiopia. The Ethiopia Water Resource Proclamation, in the same manner, declares that water resource is the common property of the Ethiopian people. Water is a public asset, meaning that there are no privately owned water resources in Ethiopia. A derivative of the common ownership of water resources places the government an agent of the people and as custodian of the water resources and as result, has three obligations as per the FDRE constitution.<sup>111</sup>

First, the government must refrain from unfairly interfering with people's access to water. This imposes an obligation on the government not to interfere with the human right to water and the absolute protection of domestic water use afforded by various laws. Second, the government must protect people's access to water from interference by other. There is a possibility that other potential water use may interfere with the human right to water and it is the duty of the government to prevent other potential water users from interfering with the enjoyment of the right. This is especially vital in rural areas where the probability of water uses without duly interfering the rights of downstream users is 'unlikely and rare'.<sup>112</sup> Thirdly, the government must adopt necessary measures directed towards the full realization of the right, for example, by passing legislation, devising and implementing programs, allocating budgets and monitoring their progress. The government has the "duty to hold, on behalf of the people, land and other natural resources and to deploy them for their common benefit and development".<sup>113</sup> The power of legislating on water uses and an order of priority lies with the federal government.<sup>114</sup>

As per the FDRE Constitution, regional states have the power to enact laws that deal with the administration of natural resource in accordance with the federal laws.<sup>115</sup> As such, both the federal and state governments are required to put in place appropriate laws that regulate the management of water resources to attain the "highest social and economic benefits".<sup>116</sup> The

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<sup>110</sup> *Id.*

<sup>111</sup> In some jurisdictions like Ethiopia, water resources are designated to be publicly owned and administered by the state on behalf of the people and this is conceptually known as 'public trust doctrine'. See Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19(1) ENVIRONMENTAL LAW, 85-491, (1989). Citing Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, UTAH L. REV. 388 (1970).

<sup>112</sup> Scott and Coustalin, (1995), *supra* note 100, 832.

<sup>113</sup> Art 89(5) of FDRE Constitution.

<sup>114</sup> *Id.* at Art 51(1).

<sup>115</sup> *Id.* at Art 52(2)(d).

<sup>116</sup> See FDRE Water Resources Management Proclamation 197/2000, Art 6(2).

“social benefits” imply the human right to water since the provision of access to clean and drinkable water is one that must be given priority in the administration of water resources.

### C. Human Right to Water and Public Health Proclamation and Policy

The Public Health Proclamation is one of a domestic regulatory framework having relevance to the human right to water concept. The Public Health Proclamation No. 200/2000 makes it illegal to provide water “unless its quality is verified by the Health Authority”.<sup>117</sup> One of the core contents of the human right to water is the quality of the water. The quality of water is at the center of the country Public Health Proclamation. It has placed the mandate of controlling the quality of water to the Ministry of Health and waters must first be checked for their quality before it is delivered to users. Furthermore, Public Health Proclamation also states that “no person shall dispose of solid, liquid or any other waste in a manner which contaminates the environment (*among other things water*)” (emphasis added).<sup>118</sup> Another core content of the human right to water is the safety of drinkable water and it is addressed in the same Proclamation. The Proclamation makes it illegal to dispose of any form of waste in a manner that will endanger the safety of the environment, among other things, water. Therefore, it can be deduced that the Public Health Proclamation addresses quality and safety, which are core elements of the human right to water. The Health Policy’s “general strategies” in article 3 states the promotion of “intersectoral collaboration” including “accelerating the provision of safe and adequate water for urban and rural populations”.

Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009 (hereinafter Food, Medicine and Health Care Proclamation) has relevance in the ongoing discussions about the human right to water. Article 30 of Food, Medicine, and Health Care Proclamation deals with water quality control and states that: 1) it is prohibited to supply water for public consumption from spring well or through pipes unless its quality is verified by the appropriate organ. 2) it is prohibited to import or produce and distribute bottled mineral or plain water for public consumption unless its quality is verified by the existing organ.<sup>119</sup> The Food, Medicine and Health Care proclamation emphasizes that maintaining the quality of water sustainable for human consumption must be checked by appropriate organs. Imported or produced bottled water quality must be checked. Therefore, Food, Medicine, and Health Care Proclamation addresses the safety of water, which is one of the core contexts of the human right to water.

### D. The Right To Water in Ethiopia Water Sector Policy

Initiating and implementing national policies that embrace a human right to water approach to delivering water services is a function and mandate of the executive organ of the government.<sup>120</sup>

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<sup>117</sup> See Art 10 of the Public Health Proclamation No. 200/2000 , FEDERAL NEGARIT GAZETA, 6<sup>th</sup> Year No. 28 Addis Ababa, 9<sup>th</sup> March 2000 (herein after Public Health Proclamation)

<sup>118</sup> *Id.* at Art 12.

<sup>119</sup> Food Medicine and Health Care Administration and Control Proclamation No.661/2009, FEDERAL NEGARIT GAZETA, 16<sup>th</sup> Year No. 9, Addis Ababa, 13<sup>th</sup> January 2010.

<sup>120</sup> Art 77 (6) of the FDRE CONSTITUTION.

Urging a closer reading of executive water policy may well be ultimately responsible for the impediments to the full actualization of the human right to water. .

The Water Policy of Ethiopia was adopted in 2001 after the enactment of Water Resource Management Proclamation. It is an important policy document elaborating on water delivery. It explicitly recognizes that “Macro Economic and Social policies and development strategies, as well as objectives accepted by the Federal Democratic Republic of Ethiopia and the principles of water resources development objectives, must enhance the socio-economic development of the peoples of Ethiopia”.<sup>121</sup> Accordingly, subject to available resources, it is the state’s responsibility to provide clean and safe water and the state’s responsibility to manage water resources sustainably.<sup>122</sup> In view of this, the policy recognizes the “provision of basic necessities of water at the household level’ must be given the highest priority when addressing water development and use”.<sup>123</sup> It also stipulates special criteria that shall be used in allocating water resources for domestic use while apportioning other uses through highest socio-economic benefits.<sup>124</sup> The policy adheres conceptualizing water supply within the context of the human right to water.

The Ethiopian Water Policy presents in further detail regarding the quality of water basic to fulfill vital human needs by making implicit reference from which water for human consumption ought to be sourced. For instance, the Water Policy anticipates that water for domestic use is to be sourced from household connections; public standpipe, borehole, protected dug well, and protected spring.<sup>125</sup> This is presumably because these water sources can be easily developed given the limited resources of the country.

#### **E. Water Permit and Water Price (Tariffs)**

The Water Resource Development Proclamation and Water Resource Policy recognize water rights for basic needs in view of fulfilling social equity. The right to use water resources for various activities requires permits.<sup>126</sup> Nevertheless, there are water uses for which it is not necessary to obtain licenses.<sup>127</sup> These are water use from hand-dug wells and use of water for traditional irrigation, artisanal mining, for traditional animal rearing as well as water mills. The exemption of water permit for domestic-related activities such as personal and limited household consumption has a direct implication on the human right to water. The exemption affords protection to domestic water use as envisaged by the Water Resource Development Proclamation and Water Resource Policy. Water permits and priority of allocation have also an implication on the human right to water. The issuance of water permit in accordance with the protection of domestic use in priority of allocation among potential water use can cement the human right to

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<sup>121</sup> Ethiopian Water Sector Policy, 4. Also refer to the meaning of ‘domestic use’ in the Water Resource Proclamation referred to earlier. See art 6 (2) of Water Resource Proclamation.

<sup>122</sup> *Id.*, at 4.

<sup>123</sup> *Id.*, at 7.

<sup>124</sup> *Id.*, at 2.

<sup>125</sup> Mulugeta Ayalew, Jonathan Chenoweth, Rosalind Malcolm, Yacob Mulugetta, Lorna Grace Okotto, and Stephen Pedley, *Small Independent Water Providers: Their Positions in the Regulatory Framework for the Supply of Water in Kenya and Ethiopia*, 26, JOURNAL OF ENVIRONMENTAL LAW, 77 105-128 (2013).

<sup>126</sup> See Art 11(1) of the Water Resource Proclamation.

<sup>127</sup> *Id.*, at Art 12.

water. The domestic use has a priority in water permit systems and it reinforces the human right to water.

On the other hand, the Water Resource Policy has stipulated that water has to be considered both as an economic and social good. Water has to be priced in order to promote economic efficiency, social equity, and ecological sustainability. Generally, water tariff structures according to the Ethiopian Water policy are site-specific and determined according to local circumstances.<sup>128</sup> The same water policy also advocates that tariff structures (Water prices) should be based on equitable and practical guidelines and criteria.<sup>129</sup> With regard to water supply and sanitation services, the commanding principle issued in the Ethiopian Water Resources Management Policy is that the “user pays principle”, especially for urban water supply and sanitation services.<sup>130</sup> The policy further states that the “user pays” principle should carefully be harmonized with the ability and willingness to pay principles.<sup>131</sup> The Ethiopian Water Resources Management Policy strongly emphasizes that tariffs should neither be too low leading to the abuse of its use or should it be too high discouraging consumption.<sup>132</sup> While rural tariff settings are based on the objectives of fully meeting the operation and maintenance costs, urban tariff structures are based on the basis of full cost recovery.<sup>133</sup>

One of the core contents of the human right to water is the affordability of water tariffs. The Ethiopian Water Policy considers the ability of the water supply consumers and it must be harmonized with the actual ability to pay. The Policy exempts economically disadvantaged rural communities from paying water service tariffs and the cost must be borne by the government, as appropriate, and in so far as the communities are able and willing to cover the operation and maintenance costs on their own. The policy affords protection to disadvantaged rural communities and their basic human needs of water must be ensured. The policy’s objective of fully meeting the operation and maintenance costs, for rural community water users have an implication on the human right to water. The policy main objective of maintaining the operation and maintenance cost is an indicator of the commitment of the policy in ensuring the right of access to water for basic human needs. Therefore, the water policy has addressed the issue of affordability of water services which is one of the core contents of the human right to water.

## **F. Other Subsidiary Legal Documents**

### **1. Ethiopian Environmental Policy**

The Ethiopian Environmental Policy states that it is important to maintain “water quality and quantity” for the use, development, and management of water resources. This indicates that the water quality and quantity as important contents of the human right to water recognized by the international human right instruments are also reemphasized in the Ethiopian Environmental

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<sup>128</sup> Section 2.2.5 (b) of Water Policy of Ethiopia.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

Policy. Moreover, the Environmental Policy also addressed the correlation provision of adequate water supply and the right to sanitation, which is considered as an extension of the human right to water. The policy recognizes the paramount importance of adequate water supply as “an important component in achieving a sustainable and healthy urban environment, and on the other hand to recognize the minimization of the need for water as an important factor in the choice of sanitation technologies”.<sup>134</sup> The policy has also addressed the affordability of access to water as one of the core content of the human right to water and that uses of water and consumption should be charged appropriately and provide, if appropriate, subsidies, taxes or tax concessions to achieve the sustainability of the use of natural resource.<sup>135</sup>

## **2. National Hygiene and Sanitation Strategy**

The National Hygiene and Sanitation Strategy is relevant in order to understand the human right to water in the Ethiopian context. It is one of the strategies that concretize the human right to water from the perspective of water quality and safety. The strategy underscores that, “all drinking water supplies must be routinely monitored for chemical and bacterial pollutants”.<sup>136</sup> The strategy emphasis on the chemical and bacterial free contaminated water as a prerequisite for safe drinkable water. One of the core contents of the human right to water is that drinkable waters must be safe for human consumptions.

## **3. Ethiopian Growth and Transformation Plan (GTP) I and II**

The Ethiopian Growth and Transformation Plan I and II (hereinafter GTP I and II) have incorporated the human right to water. According to GTP I, development and expansion of reliable water supplies to rural and urban areas have been undertaken. One of the aims of GTP I was ensuring fair and equitable development and utilization of the country’s water resources for sustained socio-economic development. According to the standard of GTP I, national potable water supply coverage recorded was 84%, with rural coverage being 82% and urban 91% in 2014/15.<sup>137</sup> The GTP I standard of physical accessibility is fifteen liters per person on daily basis within 1.5km radius for rural areas and twenty liters per person on daily basis within 1 km radius for urban areas.<sup>138</sup>

In the same manner, the aim of GTP II is expanding water supply coverage and it has set standards. Based on these standards, rural and urban water supply shall be strengthened.<sup>139</sup> According to the standard of GTP II, the accessibility of rural water services is expected to provide twenty-five liters per person within a 1km radius.<sup>140</sup> Urban residents based on demand

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<sup>134</sup> Federal Democratic Republic of Ethiopia, Ethiopian Environmental Policy, Addis Ababa, para 3.7 (I) (1997).

<sup>135</sup> *Id.* at para 4.6(f).

<sup>136</sup> Ethiopia National Hygiene and Sanitation Strategy, Ministry of Health, Federal Democratic Republic of Ethiopia, Addis Ababa 22 (2005). Available at <http://documents.worldbank.org/> (accessed on 27<sup>th</sup> September, 2017).

<sup>137</sup> The Federal Democratic Republic of Ethiopia Government Growth and Transformation Plan I 2010/11-2014/15, 77 (2010).

<sup>138</sup> *Id.*

<sup>139</sup> Ethiopian Growth and Transformation II, 182 (2016).

<sup>140</sup> *Id.*

categories<sup>141</sup> are expected to be provided with 100, 80, 60, 50 and 40 liters per person. The plan of GTP II of twenty liters and above per person per day for rural and urban areas respectively are above and compatible with the minimum standards set by the World Health Organization (WHO), which is 20 liters of potable water per person per day. The WHO has set out a standard of 20 liters of potable water per person per day as a minimum level of protection of the right to water.<sup>142</sup> The 20 liters are “the amount of water needed to satisfy metabolic, hygienic and domestic requirements of safe water (water free from biological or chemical agents at concentration levels directly detrimental to health) per day are available within one kilometer of a dwelling (the distance measured from a house to a public stand post or any other improved drinking water sources)”.<sup>143</sup>

#### 4. *The Ethiopian Human Rights Action Plans*

National Human Rights Action Plans do give emphasis to the human right to water. The First Human Rights Action Plan (2013-2015, hereinafter “The First Action Plan”) reaffirms that Ethiopia is committed to the progressive realization of the access to clean water as stipulated in the FRDE Constitution and other subsidiary water laws. It emphasizes that national water sector policy, Water Resource Management Proclamation and international human rights instruments must guide Ethiopia’s commitment on the right to clean water.<sup>144</sup> The first action plan imposes the duty and the authority to respect, protect and fulfil to the extent of the country’s resources, the right of clean water to all citizens on the Ministry of Water and Energy currently called Ministry of Water, Energy and Irrigation.<sup>145</sup>

The Second National Human Rights Action Plan (2016-2021) (hereinafter “The Second Action Plan”) also underscores the importance of access to clean water. It lays down detailed action plans that will help in realizing the right to water. According to the Second Action Plan, the coverage of access to clean water is expected to reach 85 and 75 percent in rural and urban areas respectively.<sup>146</sup> The plan acknowledges that close to 15 million people are vulnerable to chloride contaminated water and it affects the safety and quality of water supply and interferes with the enjoyment of the right to water.<sup>147</sup> Women are given special attention in the action plan since the majority of women living in rural areas do not have access to clean water supply.<sup>148</sup> As per the Second Action Plan, the standard for water coverage in a rural area for the upcoming five years is 25 liters per person within 1 km radius.<sup>149</sup> The standard for an urban area depends on the

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<sup>141</sup> Based on the size of population the ranking of the towns are; Level-I, greater than 1,000,000; Level-II, 100,000-1,000,000; Level-III, 50,000-100,000; Level-IV, 20,000-50,000 and Level-V, less than 20,000 populations according to the Ethiopian Growth and Transformation II. Id. at 39.

<sup>142</sup> World Health Organization, Global Water Supply and Sanitation Assessment 1 (2000).

<sup>143</sup> Mulugeta et al, *supra* note 125, 77.

<sup>144</sup> First Human Right Action Plan, 120-121 (2013) available at <http://www.abysinnialaw.com/human-right-documents?...1231...human-rights-action-plan> (Accessed on 28<sup>th</sup> September, 2017)

<sup>145</sup> *Id.*

<sup>146</sup> Second Human Right Action Plan, 99 (2016). The author was likely enough to have the document from one of the drafter of the Second Human Right Action Plan. Yibekal G. Agonafir, email exchanges, March. 4, 2017.

<sup>147</sup> *Id.* at 98.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

basis of demand categories. Depending on the size of the demand, urban areas water access is expected to be 100, 80, 60, 50 and 40 liters per person within 1 km radius.<sup>150</sup>

#### IV. CHALLENGES OF ADJUDICATING THE HUMAN RIGHT TO WATER IN ETHIOPIA

##### A. The Status of International Human Right Agreements and Power of Courts in the Interpretation and Application of the Agreements

The applicability of international frameworks depends initially on the status a given country gives to international instruments in its legal system. Its commitment begins with the clear statement it makes regarding the status and application of those ratified instruments. It is why usually states determine in their domestic legislations, status related issues such as incorporation, hierarchy, implementation mechanisms, implementing institutions, etc of international instruments. This section briefly discusses the status of the human right to water and related international and regional instruments,<sup>151</sup> particularly the ICESCR, CEDW, CRC, ACRWC, and ACCNNR<sup>152</sup> in Ethiopia since all the aforementioned have been ratified by Ethiopia.

The mode of incorporation of an international agreement in Ethiopia appears in chapter two of the FDRE Constitution. FDRE Constitution of Article 9 (4) recognizes the automatic standing incorporation of international instruments ratified to form “an integral part of the law of the land”. The Federal Negarit Gazeta Establishment Proclamation requires publication of every law either duly enacted domestically or ratified to have judicial notice.<sup>153</sup> Except for the CRC, many international and regional agreements have not been published in the official Federal Negarit Gazeta. The Ratification Proclamation No.10/1992 for the Convention on the Rights of the Child incorporates an article with a succinct statement about the treaty (in its full name).<sup>154</sup> Other ratification proclamations never reproduced the full text of the treaty in question and translate the treaty provisions into the working languages of the country.<sup>155</sup>

Article 2(3) of the Federal Courts Proclamation provides that all federal or regional legislative, executive and judicial organs, as well as any natural or juridical person, shall take judicial notice of laws published in the Gazette. Therefore, in relation to international human rights instruments, the ratification which is published in the official gazette, one may argue that the statements that the treaty is ratified or acceded are as good as publishing the full text of the instrument.<sup>156</sup> And, this implies that there is room for their application in the Ethiopia legal

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<sup>150</sup> *Id.*

<sup>151</sup> Ethiopia is party to international and regional human right instruments and it has signed, and ratified many of this agreements. Ethiopia ratified ICESCR on 11 Jun 1993 (a) while it has signed CEDW on 08 Jul 1980 and ratified it 10 Sep 1981. Ethiopia has also ratified CRC and ACRWC on 14 May 1991 (a) and 02 Oct 2002 respectively.

<sup>152</sup> Ethiopia has signed the African Convention on the Conservation of Nature and Natural Resources on 01/06/2004. See list of countries which have signed, ratified/acceded to the revised African convention on the conservation of nature and natural resources (adopted in Maputo, Mozambique, On 11 July 2003) available at <https://portals.iucn.org/library/sites/library/files/documents/EPLP-056.pdf> (Accessed on 01 March, 2017)

<sup>153</sup> See Art 2(3) Federal Courts Proclamation No. 25/1996, FEDERAL NEGARIT GAZETA, 2<sup>nd</sup> Year No. 13, 15 February 1996 (hereinafter Federal Courts Proclamation).

<sup>154</sup> Sisay Alemahu Yeshanew, *The Justiciability of human rights in the Federal Democratic Republic of Ethiopia*, 8 (2), AFRICAN HUMAN RIGHTS LAW JOURNAL, 287 (2008).

<sup>155</sup> *Id.*, at 288.

<sup>156</sup> *Id.*



domestic system. However, there are those who argue that publication is not an important requirement for international human rights instruments to have a legal effect. This can be inferred from the wording of the FDRE Constitution itself since the Constitution in various provisions has employed different terminologies. For instance, article 9(4) of the Constitution uses ‘ratification’ as a prerequisite for international agreements including international human right instruments to be an integral part of the law of the land.<sup>157</sup> Therefore, the requirement of publication for international human rights instruments that incorporates the human right to water to have a legal effect is still unsettled issue and a challenge in itself.

In relation to giving a judicial notice on recognizing the human right to water, article 13(1) of the Constitution imposes a duty on the judiciary to enforce the rights enshrined in the Constitution definitely extends to applying the provisions in specific cases. There is confusion on the issue of “constitutional interpretation”, and the jurisdiction of the judiciary to interpret the fundamental rights and freedoms of the FDRE Constitution in light of a ‘manner conforming to the principles of the UDHR, international covenants on Human Rights and international instruments adopted by Ethiopia’.<sup>158</sup>

On the one hand, The FRDE Constitution assigns power to interpret the Constitution to the House of Federation rather than courts.<sup>159</sup> One line of understanding is that interpretation of the entire text of the constitution lies with the House of Federation. In this regard, the FDRE Constitution stipules that “all constitutional disputes must be decided by the House of Federation”.<sup>160</sup> According to the Council of Constitutional Inquiry Proclamation, the House of Federation has the power to decide on the constitutionality of any law or decision by any government organ or official, which is alleged to be contradictory to the Constitution.<sup>161</sup>

On the other hand Article 13(1) of the FDRE Constitution imposes the obligation to respect and enforce primarily on the state organs including the judiciary. And, this line of reasoning does not limit the power of courts in Ethiopia in the interpretation and application of chapter three of the Constitution including international human right provisions. Article 13(1) of the FDRE Constitution is silent “whether we go for direct or indirect application”.<sup>162</sup> The direct application

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<sup>157</sup> Article 13(2) of the Constitution uses ‘adoption’ as means of incorporation of international human right instruments to have a legal effect. Article 57 of the same Constitution employs “deliberated upon and passed by...” for any law to have a legal effect. In a similar manner, article 71 92) imposes an obligation on the FDRE president to ‘proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples’ Representatives in accordance with the Constitution’. These are the comments I borrowed from one of the reviewers.

<sup>158</sup> See Art. 13 (2) of the FDRE CONSTITUTION.

<sup>159</sup> *Id*, Arts. 62(1) & 82-84. The House of Federation is the Upper House vested with the power to interpret the Constitution up on a recommendation from Council of Constitutional Inquiry, a body that mainly consists of legal experts.

<sup>160</sup> *Id*, Art. 84 (1).

<sup>161</sup> See art 2(1), Council of Constitutional Inquiry Proclamation No. 250/2001, FEDERAL NEGARIT GAZETA, 7<sup>th</sup> Year No. 40, Addis Ababa, 6<sup>th</sup> July 2001.

<sup>162</sup> Direct application are to be “directly applied to cases in court proceedings as a special regime of law entailing a special regime of remedies while indirect application are application of the human rights chapter not directly to cases that are presented before a court but rather as tools that indirectly influence laws, decisions, actions, and

of chapter three of the FDRE Constitution by other organs of the government is limited and it is “safe to conclude that courts are expected to take the challenges of direct application”.<sup>163</sup> It is silent “as to whose responsibility it is to interpret”.<sup>164</sup> However, the Council of Constitutional Inquiry Proclamation No. 250/2001 stipulates that “any person who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the CCI for constitutional interpretation”.<sup>165</sup>

In this regard, Tsegaye argues: (a) interpretation of all laws including the FDRE Constitution is the core task of the judiciary (b) unless it is explicitly indicated in other section of the FDRE Constitution, the interpretation of the entire text of the Constitution including chapter three is an inherent judicial function (c) there is no absolute “prohibition of judicial interpretation although there is the explicit recognition of the mandate of the House of Federation in this regard”.<sup>166</sup> It makes no sense to put the burden of enforcing the constitutional rights on the judiciary and at the same time depriving them of the power in the interpretation and application of chapter three of the Constitution. It will be difficult for courts, for instance, to determine the core contents of the human right to water if a case is submitted to them provided that the issues are justiciable.<sup>167</sup> In connection with enforcement presupposes interpretation, Assefa Fiseha noted that the task of the judiciary in respecting and enforcing the Constitutional Bill of Rights is “illusionary unless the judiciary is, in one way or the other, involved in interpreting the scope and limitation of those rights and freedoms for which it is duty-bound to respect and enforce”.<sup>168</sup> Courts are in a position to interpret chapter three of the Constitution without determining the constitutionality of an action of organs of the government which must be left to the House of Federation. Yonatan Tesfaye noted that “constitutional interpretation may not always be in determining the constitutionality of legislation”.<sup>169</sup> After all, in practice courts interpret the provisions of chapter three of the Constitution.<sup>170</sup>

Legislations enacted after promulgation of the Constitution have reinforced that courts indeed have power to interpret fundamental rights and freedoms specified in the FDRE Constitution “although they do not comprehensively regulate it”.<sup>171</sup> That ordinary courts have jurisdiction over cases arising under the Constitution is confirmed by Article 3(1) of the Federal

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practices”. See Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, Vol. 3 (2), MIZAN LAW REVIEW, 311 (2009).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 319.

<sup>165</sup> See Article 23(1) of Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/200 FEDERAL NEGARIT GAZETA, 7<sup>th</sup> Year No. 41, Addis Ababa, 6<sup>th</sup> July. 2001. It must be noted that Authors such as Assefa Fiseha have questioned the constitutionality of the Proclamation No. 250/2001. For detailed discussion of the subject matter see Asefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)*, 1(1) MIZAN LAW REVIEW, 17 (2007).

<sup>166</sup> Tsegaye Regassa, *supra* note 162, 320.

<sup>167</sup> Justiciability of the human right to water is discussed in the next section.

<sup>168</sup> Assefa Fiseha, *Constitutional Interpretation: the Respective Role of Courts and the House of Federation*, in Faculty of Law/Civil Service College (ed.) Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution 14 (2000).

<sup>169</sup> Yonatan Tesfaye, *Whose Power is it anyway?* 22 (1) (2008), JOURNAL OF ETHIOPIAN LAW, 134 (2008).

<sup>170</sup> Tsegaye Regassa, *supra* note 162, 319.

<sup>171</sup> Abdi Jibril and Appiagyei-Atua, *supra* note 82.

Courts Proclamation which provides that “federal courts shall have jurisdiction over cases arising under the constitution, federal laws, and international treaties”. And, Article 6(1) of the same proclamation states that federal courts shall settle cases or disputes submitted to them on the basis of, among others, international treaties. In practice, however, litigants and as well as courts avoid referring to international human rights instruments ratified by Ethiopia even in cases where they are directly relevant.<sup>172</sup>

The Proclamation establishing the Ethiopian Human Rights Commission and the Institution of the Ombudsman also imply that courts have “power over the violation of fundamental rights and freedoms”.<sup>173</sup> Ethiopian Human Rights Commission Establishment Proclamation Article 6(4) empowers the Commission to “undertake an investigation of human rights violations” while Article 7 “prohibits Commission from investigating complaints on human rights violations when they are brought before courts of law at any level”.<sup>174</sup> In the same manner, Ombudsman Establishment Proclamation under Article 7(2) prohibits the institution of the Ombudsman from investigating “cases pending in courts of law at any level”.<sup>175</sup>

### **B. The Ethiopian Approach to Justiciability of the Human right to water**

It is generally agreed that the realization of economic, social and cultural rights is costly, unlike the realization of the civil and political rights, and that such costs pose major challenges to the realization of the human right to water.<sup>176</sup> The limitations of “maximum available resources” and “the progressive realization” have surfaced as some of the challenges to the fulfillment of the obligation of the states of the human right to water.<sup>177</sup> Some scholars also argue that courts lack the ability to fully understand and adjudicate the complex issues involved justiciability of the human right to water.<sup>178</sup>

It is true that justiciability of the human right to water can be realized in the Ethiopian legal system if the right is expressly protected as the justiciable substantive norm and are directly enforceable by the adjudicatory organ. However, that is not the case and the human right to water is inferred from the Constitution through an extended and derivative interpretation of social rights and related human right norms. Hence, the only way out to make the human right to water a justiciable matter is to rely on the indivisibility, interdependence, and interrelatedness of all human rights. For instance, the right to life is enshrined in the FDRE Constitution and the ICCPR and this could have implications for the justiciability of the right to water at national and international level. In other words, if the human right to water is violated, it may by extension

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<sup>172</sup> Sisay Alemahu, *supra* note 154, 286.

<sup>173</sup> Abdi Jibril and Appiagyei-Atua, *supra* note 82, 1.

<sup>174</sup> See Arts. 6 & 7 of Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000, FEDERAL NEGARIT GAZETA, 6th year No. 40, Addis Ababa, 4 July 2000; See also *Id.*

<sup>175</sup> See Institution of the Ombudsman Establishment Proclamation No. 211/2000, FEDERAL NEGARIT GAZETA, 6th year No. 41, Addis Ababa, 4 July 2000. *Id.*

<sup>176</sup> Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio Economic Rights In National Law* 22 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 35-64, 45 (2006).

<sup>177</sup> Salman, *supra* note 2, 977.

<sup>178</sup> [], *What Price for the Priceless?: Implementing the Justiciability of the right to water*, HARVARD LAW REVIEW, Vol. 120, 1067- 1088 , 1075 (2007) .

mean denying the human right to life.<sup>179</sup> Another example, a court may, for instance, find a policy adopted to realize the right to health in violation of the human right to water if it happens due to lack of access to water and sanitation.

The Constitution incorporates social rights, water supply as one of the most important components of the human right to water, under the “crudely-formulated” provision of Article 41.<sup>180</sup> Without specifically listing and defining these rights, the article generally requires “the creation of an equal opportunity to ...health, education and social services”.<sup>181</sup> It is argued that certain social rights can be read into the broad provisions of Article 41.<sup>182</sup> The poor formulation of the article increases the ambivalence regarding the justiciability of social right as it is difficult to clearly delineate the precise scope of these rights.<sup>183</sup> However, the detailed provisions of international instruments would also be used to define the content and scope of the rights, which are protected in very general terms of the Constitution.<sup>184</sup> Article 41 of the Constitution may, for instance, be juxtaposed with ICESCR to read social rights, among other things, water services into the Constitution.

Moreover, the FDRE Constitution has adopted the fundamental objectives and directive principles of the state policy in chapter ten.<sup>185</sup> The FRDE Constitution states that “any organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter”.<sup>186</sup> Promising as they may appear, chapter ten provisions seem non-justiciable and their non-compliance cannot be taken as a claim for enforcement against the state.<sup>187</sup> The FDRE Constitution does not expressly prohibit courts from enforcing the provisions of chapter ten of the Constitution, which among other things include access to clean water under the social objectives, and it is understandingly difficult to make the provisions justiciable since it can raise so many issues such as “jurisdiction, standing, and remedy for their violations”.<sup>188</sup> In addition, Article 85 of chapter ten of the FRDE Constitution makes no explicit reference whether the national policy principles and objectives, *among other things the provision of access to water*, are “enforceable by judiciary or semi-judiciary organs (*emphasis added*)”.<sup>189</sup>

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<sup>179</sup> In some jurisdiction such as Indian legal system, the human right to water has been derived from the right to life and it is justiciable. While in South African, the national constitution explicitly makes the issue of the human right to water a justiciable matter which is upheld by their Constitutional Court. *Id.* at 1069.

<sup>180</sup> Sisay Alemahu, *supra* note 154, 275.

<sup>181</sup> See art 41 of the FDRE Constitution.

<sup>182</sup> Sisay Alemahu Yeshanew, *The Constitutional Protection of Economic and Social Rights*, JOURNAL OF ETHIOPIAN LAW, VOL. 22 (2) 135 (2008).

<sup>183</sup> Sisay Alemahu, *supra* note 154, 276.

<sup>184</sup> *Id.* at 285.

<sup>185</sup> See Art 85-92 of the FDRE Constitution.

<sup>186</sup> *Id.* at art 85 (1).

<sup>187</sup> *Id.* at Art 37.

<sup>188</sup> The Ghana judicial experiences shows that directive principles of state policy are justiciable although the Supreme Court of Justice failed to dig deep in to some of the most contentious issues such as ‘jurisdiction, standing and remedy for their violations’. See Abdi Jibril and Appiagyei-Atua, *supra* note 82, 1.

<sup>189</sup> *Id.*

Despite the absence of such clear stand in relation to the justiciability of provisions of chapter ten of the FDRE Constitution, it has been argued that “they are not justiciable”<sup>190</sup> because Article 85 and article 90 are silent on appropriateness of their justiciability of basic water rights and it requires the government, which also includes courts, to be guided by them instead. At the time of writing this article, no single case related to the enforceability of basic water rights has been brought to the attention of the judiciary or the House of Federation. However, it does not mean that the basic water rights are not justiciable. First, the silence of national policy principles and objectives on the justiciability of national policy objectives ‘does not make them non-justiciable’.<sup>191</sup> Since all laws including the FRDE Constitution are meant to be justiciable, “it is not necessary to include a provision on their enforceability in courts”.<sup>192</sup> Second, since all laws are made to guide any organ of government in pursuit of various objectives, and “the provisions that the government shall be guided by chapter 10 of the Constitution, cannot be understood as prohibiting their enforcement”.<sup>193</sup>

It can also be argued that the social objectives of the FRDE Constitution in ensuring the right of access to water do not require the determination of a particular level of resources to be spent by the state and, thus, it is justiciable. For instance, ensuring the human right to water requires a huge investment in constructing dams, digging holes, constructing pipelines and related infrastructures. And, the obligation of states to fulfill the demand for basic water needs requires huge resources and the state can be held responsible if it fails to progressively increase resources required to develop water infrastructures. However, the realization of the human right to water may not demand resources; for instance, issuing an injunctive order requiring a state to abstain from interfering with the enjoyment of the right by a citizen and that it is justiciable. The state can also prohibit other parties including individual and companies from interfering with the enjoyment of the right through an act of pollution, contamination or diversion of water supply. Ensuring the human right to water requires respecting and protecting citizens’ enjoyment from the undue interference from state and non-state actors and that it is justiciable.

## V. CONCLUSION

The human right to water is a recent development under international human rights law. It is not mentioned explicitly in the bill of rights and has initially surfaced in to the body of international human rights law through the general comment 15 on article 11 and 12. According to general comment 15, the human right to water emanates from the right to adequate standard of life and the right to health. This right is also advanced through other soft laws. As a new development and not well advanced through jurisprudence, however, one can simply expect challenges particularly on the implementation of this right at domestic level. This article set out to explore the extent to which human right to water is embodied in the FDRE Constitution and the Ethiopian Water Development Proclamation and Water Resource Policy as well as other laws

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<sup>190</sup> Sisay, *supra note*, 154, 142.

<sup>191</sup> Abdi Jibril and Appiagyei-Atua, *supra note* 82, 1.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

and policies to demarcate the content and nature of the right. The human right to water is not explicitly mentioned in the human and democratic rights chapter of the Constitution. However, the human right to water is spelt out under article 90, national policy and principles and objectives section of the FDRE Constitution. It is also implicitly envisaged under Water Resource Proclamation, and Water Resource Policy of the country which requires prioritizing domestic use over other uses.

However, the fact the human right to water is mentioned under the national policies, principles, and objectives rather than under chapter three rights has raised concerns on whether citizens are able to invoke a human right to water in the court of law. The article argues that there is a room for recognizing the enjoyment of the right through judicial activism. Firstly, nowhere in the Constitution is said that socio-economic rights, among other things, the right of access to basic water needs, is non-justiciable. Moreover, justiciability based on the nature of rights has waned as human rights are considered universal, indivisible and interdependent under international human rights law. Thus, government can be held accountable for its regressive measure or for omission to improve the right of citizens to the supply of clean water which it is expected to realize it progressively. Considering that the FDRE Constitution requires interpretation of chapter three rights, there appears to be ample leeway for judicial activism in support of the promotion of the human right to water in Ethiopia.

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